FILED
NOV 13 1956
JOHN T. FEY, Clerk

No. 573

In the

Supreme Court of the United States

OCTOBER TERM, 1956

LaVerl Johnson and Joleen Johnson, husband and wife, and Pacific Fruit Express Company,

Petitioners,

v.

Union Pacific Railroad Company, a corporation,

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

GEORGE R. PHILLIPS,
LOUIS F. RACINE, JR.
B. W. DAVIS
317 West Center
Pocatello, Idaho

WILLIAM D. DONNELLY
1625 K. Street, Northwest
Washington, D. C.

GATEWAY PRINTERS—POCATELLO

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2-4
Constitutional provision and statute involved	4
Statement	4-19
Reasons for granting the writ	19-45
Conclusion	45
Appendix A	46-57
Appendix B	57-58
Appendix C	59

CITATIONS

Cases:

Abbott v. Arkansas Utilities Co., 165 F. 2d 339	43
Albrethson v. Carey Valley Reservoir Co., 67 Idaho 529	39
Angel v. Bullington, 330 U. S. 183	33
Ashwander v. T. V. A., 297 U. S. 288	35
Baltimore & C. Line v. Redman, 295 U. S. 656	21
Baylis v. Travelers Ins. Co., 113 U. S. 316	32

Bailey v. Central Vermont Ry. Co.,
319 U. S. 350 32
Bernhardt v. Polygraphic Co.,
350 U. S. 198 43
Berry v. United States,
312 U. S. 450 21
Bowman v. Adams,
45 Idaho 217, 261 Pac. 679 (1927) 37
Brown v. Herrick,
34 Idaho 171, 200 Pac. 117 37
Chase v. Washington Water Power Co.,
62 Idaho 298 ..... 39, 40, 41
Cold Metal Process Co., v. McLouth Steel Corp.,
126 F. 2d 185 33
Daltry v. Media Elec. Light Co.,
208 Pa. 403 36
Eaton v. City of Weiser,
12 Idaho 544, 86 Pac. 41 41
Erie R. Co. v. Tompkins,
304 U. S. 64 32
Griffin v. McCoach,
123 F. 2d 550 33
Gunning v. Cooley,
281 U. S. 90 ..... 21, 28
Hill v. Bice,
65 Idaho 167 21
Hillsborough v. Cromwell,
326 U. S. 620 43
Jackman v. Equitable Life Assur. Soc., of United States,
145 F. 2d 945 33
Jacobs v. New York City,
315 U. S. 752 32
Joslin v. Idaho Times (1939),
60 Idaho 235, 91 P. 2d 386 42
Lavender v. Kurn,
327 U. S. 645 21
Lumbra v. United States,
290 U. S. 551 21

Martineau v. City of St. Paul,
172 F. 2d 777 33
Mattson v. Central Electric and Gas Co.,
174 F. 2d 215 33
McKee v. Chase,
73 Idaho 491 21
Milton v. Granite State Fire Ins. Co.,
196 F. 2d 988 43
Myers v. Reading Co.,
331 U. S. 477 21
Ohio Power Co., v. Beck,
(Ohio) 199 N. E. 860 36
Pierce v. United States,
142 F. Supp. 721 42
Reitz v. Mealey,
314 U. S. 33 43
Scott v. Pac. Power and Lt. Co.,
178 Wash. 647, 35 P. 2d 749 39
Slocum v. N. Y. Life Ins. Co.,
228 U. S. 364 21
Spielberger v. Textron Inc.,
172 F. 2d 85 33
Splinter v. City of Nampa,
70 Idaho 287 ..... 39, 41
Tiller v. Atlantic C. Line,
318 U. S. 54 ..... 21, 28
Tennant v. Peoria & P. U. Ry. Co.,
321 U. S. 29 ..... 21, 28, 32
Utah Power and Light Co., v. Pfost,
286 U. S. 165 (1931) 35
West v. American T. & T. Co.,
311 U. S. 223 32
Younie v. Blackfoot Light & Water Co.,
15 Idaho 56 39
Wilkinson v. McCarthy,
336 U. S. 53 ..... 21, 32
Yoder v. Nu-Enamel Corporation,
117 F. 2d 488 33

STATUTES AND MISCELLANEOUS

California Civil Code,
Sec. 1737, 1739 36
Idaho Code:
Sec. 54-1001 12
Secs. 64-201, 64-203 36
Nebraska Rev. Stats., 1943,
Secs. 69-417, 69-419 36
Rules of Decision Act,
28 U. S. C. Sec. 1652 4
Seventh Amendment,
United States Constitution 4
Uniform Sales Act,
Secs. 17, 19 36
Utah Code, 1943,
Secs. 60-2-1, 60-2-3 36

No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1956

LaVerl Johnson and Joleen Johnson, husband and wife, and Pacific Fruit Express Company,

Petitioners,

v.

Union Pacific Railroad Company, a corporation,

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 11, 1956.

OPINIONS BELOW

The district court filed no reported opinion. The opinion of the court of appeals (App. A, *infra*, pp. 46-55) is reported at 233 F. 2d 427.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1956 (App. A; *infra*, p. 56). Timely petition for rehearing was filed July 9, 1956, and rehearing was denied on August 3, 1956 (App. A, *infra*, p. 57). By order of Mr. Justice Douglas, dated October 5, 1956, time for filing petition for writ of certiorari was extended to and including November 15, 1956 (App. B, *infra*, p. 57-58). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the provisions of the 7th amendment were violated in a negligence action where the Court of Appeals reversed judgment for Plaintiff entered on a jury verdict and remanded with directions to enter judgment for Defendant, there being no speculation as to the cause of injury to the Plaintiff where the supplier of 12,500 volts of electricity continued to supply energy to substation after knowledge of the hazard to persons such as plaintiff created by the substation's dangerous design and operation and where the Court of Appeals based its conclusions on its own findings that the substation was safe for trained electricians and safe for untrained persons when properly cautioned despite evidence that

showed a substation built in 1925 was so designed and maintained that a pole-top switch, the only disconnecting switch in the enclosure that was labelled as such or even operable without other apparatus, created the inference it shut off all current in the substation but was misleading and in fact shut off current to the transformers but left a deadly charge of 12,500 volts in uninsulated leads to lightning arresters within 3½ feet of the ground and easy reach of any person within the enclosure who might touch them through accident, or misunderstanding, where the evidence showed such design and lack of protection was in the opinion of experts highly hazardous, was contrary to contemporary practice and custom of other companies, could have been obviated by simple and inexpensive rewiring, by relocation of, or by separate barricades for, the old-type lightning arresters, or by use of "new" type arresters which had been the only type sold since 1927; where the design was also shown to be contrary to the national electric code constituting part of the law of Idaho; where it was the uncontradicted testimony of experts called by both parties, that the substation was unsafe for entry by unqualified persons at any time.

2. Whether the Court of Appeals in reviewing the trial court has deprived plaintiff of his right under the Rules of Decision Act to have his case decided in accordance with the law of Idaho by ignoring the decisions of the Idaho courts with respect to closely related issues establishing:

(a) that title to undetermined goods does not pass until delivery;

(b) that custom and practice are merely evidential

and not conclusive on the question of reasonable care;

(c) that the seriousness of the risks incident to distribution of high-voltage electricity require every known precaution and outweigh considerations of expense to the industry;

(d) that where an independent contractor is employed to perform work involving grave danger and foreseeable risk to others unless precautions are taken, it is the duty of the contractee to take such precautions including selection of a competent contractor.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Rules of Decision Act (28 U. S. C. sec. 1652) provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT

Petitioners, LaVerl Johnson and wife, brought this suit in the United States District Court for Idaho against the re-

spondent, Union Pacific Railroad Company, to recover damages for personal injuries by reason of electrical burns to Johnson, necessitating the amputation of both legs just below the knee and his right arm at the shoulder.

Jurisdiction was based on diversity of citizenship (R. 3). Johnson's employer, Pacific Fruit Express Company, was permitted to intervene as party plaintiff (R. 13).[1]

The complaint alleged that plaintiff, a laborer, in the employ of Pacific Fruit, suffered severe electrical burns through the negligence of defendant in the furnishing of electrical energy and in the operation of an electrical substation located in Pocatello, Idaho.

On trial to a jury, and at the close of all the evidence, defendant's motion for directed verdict was denied (R. 363, 365). The jury returned a verdict for the plaintiff in the amount of $225,000 (R. 19). Defendant's motions for judgment notwithstanding verdict and for new trial (R. 20), were denied (R. 35).

On appeal by the defendant, Union Pacific Railroad Company, the Court of Appeals for the Ninth Circuit reversed with directions to enter judgment for defendant (App. A, *infra*, p. 55).

The principal controversies as to Union Pacific's liability revolved around the issue whether it controlled, solely or jointly, the high-voltage current in the uninsulated and in-

---

[1]This was to permit Pacific Fruit to recover as subrogee amounts paid by it to petitioners under the Idaho Workmen's Compensation Act (R. 30).

adequately protected wires at the point of injury; and whether, having knowledge of the hazardous design and operation of the station and of the risk to laborers who were being sent into the substation by Pacific Fruit, their employer, the Union Pacific was liable to plaintiff for its failure to shut off the current which at 12,500 volts would cause serious injury or death to anyone who touched the wire in the substations.

EVIDENCE FOR PLAINTIFF

On the date of the plaintiff's accident, November 4, 1950, the Union Pacific Railroad Company at Pocatello, Idaho, owned and operated an electrical transmission or distribution system including seven substations which, in addition to servicing its own facilities, served those of the Pacific Fruit Express (hereinafter called "Pacific Fruit") as well (R. 349, 161, 114, 115, 189, 210).

Relationship of the parties.—Pacific Fruit is a car-line operator. It has an ice plant or refrigeration department, a car department and a store department at Pocatello (R. 360-361) where it furnishes refrigerator cars and protective service, including refrigeration and heater services, for the Union Pacific (R. 314, 359-360). The substation was built in 1925 under a contract dated March 1, 1924, with the Oregon Short Line Railroad Company, defendant's predecessor railroad operator, for the construction of a substation and the purchase of power (R. 314). The contract, inter alia, recited (Ex. 26; R. 314):

"Whereas, the Pacific (Fruit Express) Company is handling the refrigeration work of and for the Railroad Company at Pocatello, Idaho, and in connection with the handling of said refrigeration desires to secure from the Railroad Company electric power for use in connection with said refrigeration; . . .

and provided (R. 315):

"1. The Railroad Company will construct pole and wire lines and a 600 KVA transformer station *necessary for the delivery of power at approximately 2300 volts and 60 cycles to the Pacific Company hereunder, maintenance, repairs, renewals and changes in said constructions shall be made by the Railroad Company* at the cost and expense of the Pacific Company.

The land for the substation and the transmission linesite connecting with the railroad distribution line was covered by a lease by Oregon Short Line to Pacific Fruit dated February 23, 1926 (R. 322), and effective as of the date on which, under the contract of April 1, 1924, power was first delivered to Pacific Fruit, i. e. August 28, 1925 (Exhibit 27; R. 322, 324).

This lease was supplemented by another between Oregon Short Line and Pacific Fruit, dated July 19, 1932 (Exhibit 28, R. 326, 332). This grants only a license for the transmission line (R. 327)[1] and it expressly limits lessee's

[1]The description and map attached to Exhibit 28 show that the tracks of the railroad extend in a northwest-southeasterly direction at this point; that from the railroad-owned switches on the junction pole on the railroad's power distribution line (R. 161, 281-282, 286-287, 342) on the northeast side of the tracks (called the Batiste transmission line) the Pacific Fruit feed line extends southwesterly 191 feet across the tracks, to the Pacific Fruit substation where Johnson was injured (R. 281-282), a fenced rectangle, 22 by 15 (R. 325) enlarged to 33 by 31 feet in 1942 (R. 123-124, 284, 336-338).

use of the leased premises to the purposes essential to the Express Company's services to the Railroad (R. 329). By supplemental agreement of November 24, 1942, the area leased for the transformer station was enlarged, the rent increased, and the Union Pacific, as lessee of the railroad from Oregon Short Line, was included with Oregon Short Line as lessor of the substation site (Exhibit 29; R. 336, 338).

The Union Pacific transmitted energy to the seven substations in its system, including that of Pacific Fruit, at 12,500 volts (R. 349). There were disconnect switches on the junction pole owned by Union Pacific (R. 287) where the Pacific Fruit's 191-foot feed line to the substation connected with the Railroad's Batiste line (R. 282, 286, 342). Within the substation enclosure, the current of 12,500 volts was stepped down by three transformers for delivery at 2,300 volts as specified in the contract, then metered at 2,300 volts to determine the amount of energy delivered to Pacific Fruit, and thence transmitted to another separate enclosure at the ice plant (R. 114-115, 167, 281, 362). The meter was read monthly by the electrical shop foreman for Union Pacific (R. 114). The Pacific Fruit purchases the electricity from defendant (R. 210) and is billed monthly (R. 211).

The substation is enclosed with a high wire fence (R. 123, 166) and is kept locked (R. 167, 169) with a key kept by the manager of the Pacific Fruit ice plant (R. 284).

Injury to plaintiff.—On November 4, 1950, the date of the injury, plaintiff was employed by Pacific Fruit Express as a minor repairman and painter (R. 107, 225). He had

very little knowledge of electricity and had never worked around high voltage electricity (R. 107). His superiors were Harold A. Shoup, Superintendent of Pacific Fruit at Pocatello (R. 123, 209-210, 224) and Howard Johnson, Assistant Plant Manager (R. 224), who had died prior to the trial (R. 123, 140). Just before noon, H. O. Johnson gave plaintiff the keys to the substation cage where the accident occurred; he told him to paint all the wires he could reach (R. 108, 128, 226-227, 231). He further told him that was the only day the power would be off and that the power was off (R. 109). After lunch, plaintiff unlocked the cage on the west side of the enclosure (R. 227) and started to paint the southernmost of the lightning arresters arranged along the east side of the enclosure (R. 110, 142, 167-168). The first wire he touched caused his injury and he woke up in the hospital (R. 110). His legs were amputated six inches below the knee and his right arm three inches below the shoulder joint (R. 146). Further amputations were necessary (R. 147, 149). Plaintiff's injuries, present condition and probable future condition were all in evidence (R. 45-113).

Immediately after the accident, it was found that the pole-top switch in the substation was open but the disconnect switches to the lightning arresters were not open and wires running into the four lightning arresters (one of which was grounded) set about 3½ feet above the ground were still "hot" at 12,500 volts (R. 162). The pole-top switch cut off current only to the transformers (R. 163). Most fea-

tures here pertinent can be seen in the photo (Ex. 16, App. C, *infra*, p. 59).

The pole-top switch, really three switches together, and known as a gandy-operated pole-top switch (R. 174) was located at the top of a frame between the transformers and the lightning arresters and was connected by a rod with an operating device or handle at a convenient height above ground level for turning it (R. 164). It bore a sign "Warning Disconnector Do not operate under load." (R. 190). With it open, or off, the transformers, on the west side of the enclosure, were dead (R. 165), but on the east side connected to the incoming line and connected ahead of the pole-top switch were the three other wires leading down to the three lightning arresters (R. 165). When the pole-top switch was open, killing energy in the transformers, these lines to the lightning arresters remained "hot" unless the three lightning arrester disconnect switches were also opened (R. 163, 165-166, 170, 175, 182). The lightning arrester disconnect switches were 12 feet above the ground (R. 204, 207) and to open them, it was necessary to use a hot stick (R. 175), a specially treated pole of wood, equipped with a hook (R. 171-172). No hot stick was in the substation enclosure on the day of the accident (R. 172).[1]

---

[1]It was kept in the engine room 150 feet away to keep it dry (R. 286, 295) although a metal container for it a little larger than the stick might have been used in the enclosure (R. 288). Superintendent Shoup and his assistant, H. O. Johnson, had authority to use the hot stick (R. 295), but Shoup had never used it except on a secondary bank in another substation adjacent to the ice plant building (R. 298).

Plaintiff's expert witness testified that the substation was hazardous because the pole-top switch with its sign: "Warning Disconnector Do not operate under load" misleadingly created the inference that it killed all current in the station and under the custom and practice of electricians or anyone else, that is what they would have a right to expect (R. 196, 206). There were no warning signs either at the pole-top switch or at the lightning disconnectors or elsewhere indicating that it was necessary to pull the latter as well in order to kill all power in the substation (Ex. 14, 16, 17 and 20; R. 240). With the pole-top switch thrown but the lightning arresters still not disconnected, not even experienced persons could be permitted to come close to the lightning arresters (R. 197) and the substation remained unsafe because bare wires carrying 12,500 volts to the lightning arresters were within 3½ feet of the ground and there was a possibility of tripping or falling on, or reaching for, them (R. 239). There was no separate barrier around the arresters which is contrary to the custom (R. 167, 181). The former state electrical inspector testified that the general practice is to mount the arresters on a high pedestal or beyond reach and accidental contact (R. 180). The foreman for Idaho Power Company confirmed that his company would have barricaded or eliminated the lightning arresters (R. 239).

The safety code also provides that where such conditions

exist there should be barriers in addition to the barrier around the substation itself (R. 180).[1]

Expert Rising testified that the "12,500 volt conductors within reach of any person who might be inside the enclosure, whether authorized or otherwise would be hazardous" (R. 178) because "they might, either through lack of knowledge or misunderstanding or through accident come in contact with them" (R. 179). No one should enter that station except in the company and under the supervision of a qualified person and it would not be safe for any one but a qualified electrician to operate the cutout switches to the lightning arresters (R. 184).

Expert Gilbert testified (R. 239): "No man should have been in that yard unless he was qualified."

Plaintiff's expert witness Smith testified the general practice in the electrical industry, for persons selling electricity through such a substation, under such hazardous conditions, if they observed them, would be to discontinue supply of current (R. 194, 199) and it is their duty to do so (R. 200) because of the hazard to lives and equipment (R. 200).

Dangerous ignorance of Pacific Fruit officers in charge of access to the dangerous substation.—Shoup, the plant man-

---

[1]National Electrical Code Handbook 32 (Ex. 24) sections 93-C, and 35, Idaho Code, Sec. 54-1001 enacted in 1947 requires that from and after the effective date of the Act all installations of wires and equipment shall be made in substantial accord with the Code. National Bureau of Standards Handbook H 32 "Safety Rules for the Installation and Maintenance of Electrical Supply and Communication Lines comprising Part 2 and the Grounding Rules of the Fifth Edition of the National Electrical Safety Code" (Ex. 24, R. 212) requires barriers, etc. [as in body] section 93-C.

ager or superintendent of Pacific Fruit plant since September 1949 (R. 209, 292) admitted that until this accident he, too, had believed that the pole-top switch cut off all the energy in the substation (R. 299).

H. O. Johnson, his assistant, had just before noon (R. 108) given plaintiff the assurance that the power was off (R. 109) after having been present in the morning when the pole-top switch, but not the lightning arrester switches, were pulled (R. 302-303, 304, 308, 310). Pacific Fruit laborers were there cutting weeds at the time (R. 303, 309), but they were merely warned (R. 310).[1]

Pacific Fruit since as early as 1947 had employed no electrician at this place and there were none at the time of the accident (R. 117, 125, 294, 300, 351).

Measures available to eliminate danger.—The manager of the Gem State Electric Company and others testified the hazard presented by the design that prevented operation of the pole-top switch from shutting off current in all parts of the station could have been remedied:

> (1) By running the three wires another 5 or 6 feet so as to connect the lightning arresters to the "load" side rather than on the "feed"[2] side of the pole-top switch (R. 176-177, 244-245).
>
> (2) By putting the lightning arresters outside of the substation (R. 177).

---

[1]The testimony does not state whether H. O. Johnson heard the warning or who gave it. H. O. Johnson was dead at the time of the trial.

[2]See R. 175-176.

(3) By following the general practice to put them on a high pedestal or beyond reach and accidental contact (R. 180, 239).

(4) By following the safety code by providing additional barriers around the arresters (R. 180).

(5) By using pellet type arresters, sold since 1927 to exclusion of old types used in the substation, mounted on tops of poles, eliminating hot wires coming down within reach of the ground (R. 201-202, 242-244).

Knowledge by Union Pacific of hazardous conditions.— Each of the hazards and dangers of this substation were readily observable by any qualified electrician (R. 181, 192, 195-196, 197, 206).

Despite these conditions, prior to the date of the accident, November 4, 1950 (R. 118, 121, 125), Pacific Fruit laborers on several occasions had been let into the substation enclosure to cut weeds or spread gravel (R. 119, 125-126) by Shoup, the Pacific Fruit Superintendent or H. O. Johnson, his assistant (R. 122-123, 132) at the same time a Union Pacific Railroad electrician was working in there (R. 119, 120-121, 123, 129). The laborers had also seen Union Pacific Railroad trucks around the substation at other times (R. 120-121). Eskelson, the electrical foreman at the shops of the Union Pacific at Pocatello (R. 113, 350), for the Railroad had been reading the meters for current delivered to Pacific Fruit at least once a month for seven years at a meter located inside the substation enclosure.

Employees of Pacific Fruit were instructed that in the event of electrical difficulties, they should call the railroad

telephone number written on the engine room wall in the ice plant (R. 117-118, 127, 133, 137-138), and they would ordinarily contact Taylor, the electric line crew foreman (R. 343). If Pacific Fruit needed electricians and called him, either day or night, somebody would be furnished to them (R. 355).

Union Pacific Railroad electricians were generally called about electrical difficulty at the plant (R. 133, 137, 171). They came to the plant and did the electrical work, and were consulted concerning equipment (R. 117, 292, 305). They admittedly had been in the substation enclosure (R. 350). Defendant's witness, Taylor, lead electrician at Pocatello in charge of 11 electricians in the line or road gang of defendant on the date of the accident, had become familiar with the substation by seeing it, observing it and going into it (R. 341, 349).

Prior to the accident on at least two different occasions electricians from the Union Pacific shops came to the plant (R. 161). Indeed, on the morning of the accident, H. O. Johnson, before turning off the power, waited for a man he introduced as a Union Pacific electrician (R. 133-134, 138-140) and was later in the morning seen working at the substation cage with a man who was not a Pacific Fruit employee and who drove off in a truck marked "U. P. Railroad Maintenance of Way" (R. 125, 129, 214-215, 230, 233).

INSTRUCTIONS AND RULINGS BY TRIAL COURT

The trial court properly instructed the jury that plain-

tiff's claim was based on the alleged negligence of defendant in the furnishing of electrical energy and in the operation of the electrical substation (R. 368); that where a company furnishing electricity to consumer's wires which it did not install and does not control, had or should have had knowledge of a hazardous and dangerous condition of wiring and appliances maintained by a customer, and continues to furnish such current with such knowledge, if injury occurs by reason of such hazardous conditions, the company is liable for injuries occurring as the proximate result of furnishing such current (R. 376).

The court also instructed that negligence consists in the doing of some act which a reasonably prudent man would not do under the same circumstances (R. 370); that "ordinary" or "reasonable" care are relative terms and the greater the danger, the greater the care required (R. 371); that since electrical energy is one of the most destructive agencies, those engaged in its operation or distribution are held to the exercise of "the highest degree of care and diligence to avoid injuries to persons who might lawfully but accidentally or otherwise come in contact with its wires carrying electricity" (R. 375).

The jury returned a verdict for plaintiff in the amount of $225,000 (R. 19). Defendant's motion for directed verdict at the close of all the evidence (R. 363) had been denied (R. 365). Motions for judgment notwithstanding the verdict and for new trial (R. 20) were denied (R.31-35) Judgment for plaintiff was entered accordingly (R. 29).

OPINION OF THE COURT OF APPEALS

On appeal, the Court of Appeals made its own independant reexamination of the facts:

As to the plaintiff's contention that the Railroad still owned the current at the point of injury to plaintiff, the court held (App., pp. 50) the "presumption" would be that title to the electricity passed at the point where control and dominion passed from one company to the other, and the court concluded that this was the point where the incoming wires went into the substation enclosure.

As to joint control by Union Pacific with Pacific Fruit (conceding that if it existed, "Union Pacific is certainly in a dangerous position in the case"), the court held (App. p. 51) that the contract obligated Pacific Fruit to maintain the station and this, with the fact that Pacific Fruit retained the keys, concluded the question.

As to the Railroad's duty as a paid supplier of current, the court said (App., p. 52):

> "We think it possible that there was at least a question of fact whether it was to be anticipated that Pacific Fruit would sooner or later let a man unfamiliar with electricity and safety measures into the enclosure without the switches all turned off. Perhaps it was foreseeable that sooner or later someone would

> get 'mixed-up' with exposed and energized wires running around at points less than full body height'."[1]

The court also recognized the law to be that the supplier of gas or electricity with knowledge has a duty to stop supply to defective equipment and appliances and is liable to third parties injured through breach of that duty, and a duty initially not to turn gas into a leaking stove or current into improperly installed wires (App., p. 53).

However, the court decides the case with its own law of non-duty stated in terms of its own findings of fact, and without regard to the jury verdict based on plaintiff's evidence (App., 53):

> "But we are not convinced that when a customer has an appliance maintained in its orginial condition of repair and function, capable of use by the trained, capable of use with safety by the untrained if properly cautioned, that the supplier has any duty or right to cut off the supply of his product (which he is obligated by contract to supply) because the customer has not modernized his plant and has not put in the latest safety devices, has not rebuilt to a high safety standard."

It held the trial court should have granted defendant's

---

[1]This case is digested (30 Gen. Dig. 2d Series No. 3 (Aug. 1956) "Electricity 16(1)") as follows:

"Where railroad sold through substation to fruit express electricity which railroad had purchased, railroad did not have duty to withhold electricity from substation in which fruit express employee was injured, even though station had become outmoded and hazardous to the uninitiated who might be admitted without precautionary instructions".

motion for directed verdict on the ground there was no duty of Union Pacific to withhold electric current here (App., p. 54), and that mandate would be to enter judgment for defendant (App., p. 54). The judgment is merely for reversal (App. A, *infra*, p. 56).

REASONS FOR GRANTING THE WRIT

The decision of the court below involves questions of law of general importance. In the exercise of the reviewing function and in setting aside the verdict of the jury the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to require the exercise of this Court's supervisory jurisdiction.

I.

THE DECISION OF THE COURT OF APPEALS DEPRIVES PETITIONER OF HIS RIGHT TO JURY TRIAL UNDER THE SEVENTH AMENDMENT

The court below set aside the jury's verdict solely on that court's own independent reexamination of the evidence. In determining the issues presented by the motions for directed verdict and for judgment notwithstanding the verdict, it disregarded entirely that its review function was limited to the question of law:

"Whether there was any substantial evidence to sustain the jury's verdict?"

That fundamental limitation, based on the requirements of the Seventh Amendment, has been hammered home by this Court.

However, so far as the court below was concerned, there is no such rule. In form, it gave no recognition to the rule; it did not marshal the evidence in support of the verdict, and it gave no consideration to what inferences might reasonably be drawn therefrom. Neither did it pass on the question whether the jury might on the basis thereof, reasonably have found negligence on the part of the defendant. Instead it stated its own inferences as on a trial *de novo* minimizing plaintiff's case to a mere showing of failure to modernize.

This petition does not, therefore, merely call on this Court again to duplicate the proper function of the court of appeals on review in such cases, and make a second reevaluation of the evidence to sustain the verdict. Since the court below did not even purport to perform that function the error here is more basic and of great general importance.

Here, in complete derogation of petitioner's constitutional right, it usurped the functions of the jury, made a de novo determination and set at naught the standards laid down by this Court to protect against such invasions of the exclusive province of the jury.

It will little avail for this Court to lay down rules for the guidance of the appellate courts in the performance of their review function if such flagrant violations of those rules go unchecked.

The standard for review established by this Court is clear. In reviewing the trial court's refusal to direct a verdict for defendant and denial of defendant's motion for judgment notwithstanding the verdict, the appellate court was called upon only to decide a question of law—Whether there was any substantial evidence upon which the verdict for plaintiff could be sustained? In deciding that question, of course, it was required to assume as established all facts in support of plaintiff's claim that the evidence reasonably tends to prove and to give plaintiff the benefit of all favorable inferences that might fairly be drawn from such facts.[1] *Gunning v. Cooley*, 281 U. S. 90, 94; *Lumbra v. United States*, 290 U. S. 551, 553.

But, once the evidentiary basis for a verdict is apparent, the appellate court's function is exhausted. *Myers v. Reading Co.*, 331 U. S. 477, 485, 486; *Lavender v. Kurn*, 327 U. S. 645, 653; *Tiller v. Atlantic C. Line*, 318 U. S. 54, 67; *Wilkinson v. McCarthy*, 336 U. S. 53, 61. The jury, exclusively, is charged with the ascertainment of facts. The court was therefor without authority to substitute itself for the jury as it did here, to determine contested issues of fact, weigh the evidence and substitute its conclusions for those of the 12 jurors. *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, 386-387; *Baltimore & C. Line v. Redman*, 295 U. S. 656, 657; *Berry v. United States*, 312 U. S. 450, 453; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 32-33.

The court of appeals decision disregards the limits im-

---

[1]The rule in Idaho courts is the same. McKee v. Chase, 73 Idaho 491, 497; Hill v. Bice, 65 Idaho 167, 175.

posed by the standard.—The court of appeals did not even make formal obeisance to the stated rule. Nowhere did it acknowledge that its function was to decide the question of law. This is not determinative. But it is not without significance when, as here, the court does not purport to summarize the evidence most favorable for plaintiff. Instead, the court's opinion makes its choice of "presumptions" as to when title passed (App., p. 50), and fails to weigh conflicting inferences as to joint control (App., pp. 50-51). The court's view of the evidence as to the defendant's liability as a paid supplier of electric current appears only as part of its statement of what it regards as being the question, and in its statements (negative in form) of the applicable law. Having referred to the testimony that the substation was modern when built in 1925, the court said (App., p. 52):

> "The question is: Did it (Union Pacific) have a duty to stop sending its electricity into the substation, which had become outmoded and a hazard to the uninitiated who might be admitted without proper precautionary instructions.

After conceding foreseeability and recognizing the general rule of law (App., pp. 52-53) the opinion rules as a matter of law (App., p. 53):

> "But we are not convinced that when a customer has an appliance maintained in its original condition of repair and function *capable of use by the trained, capable of use with safety by the untrained if properly cautioned,* that the supplier has any duty or right to cut

> off the supply of his product (which he is obligated by contract to supply) because the *customer has not modernized his plant and has not put in the latest safety devices, has not rebuilt to a high safety standard.*"

There is here no hint of recognition of the court's duty to consider whether there was any substantial evidence adequate to support the inference that the substation was hazardous for all, trained and untrained, whether cautioned or not, and determine what the evidence showed when viewed in a light most favorable to plaintiff. Plainly the court did not consider the evidence from which a jury could properly infer in support of the verdict that the inadequacy of the substation was not mere failure to have the latest safety devices but rather failure to conform to well-recognized standards as to safeguards customarily used in the industry.

The appellate court's statement disregards the pertinent evidence in support of the verdict and resolves all conflicts, if *any, against the plaintiff*.—The evidence of hazards in design and arrangement of the substation is asserted by the court of appeals to have showed merely (App., p. 53-54).

> "An appliance * * * capable of use by the trained, capable of use with safety by the untrained if properly cautioned".
>
> * * * * *
>
> "The equipment can be operated safely by the trained and safely by the untrained if properly cautioned".

1. The evidence in fact was more than adequate to

justify a finding that the substation, carrying 12,500 volts, incorporated features of design and wiring that constituted obvious and unnecessary risks for anyone who entered the substation, dangers that were pointed out by experts, dangers that were inherent in construction and arrangement, violative of contemporaneous practice and custom, contrary to safety and electrical codes and, in an important aspect at least, a lethal trap that found its victim in plaintiff.

(a) The uninsulated wires within easy reach and carrying 12,500 volts rendered the substation hazardous to anyone, qualified electrician or otherwise.

The wires to the lightning arresters carrying 12,500 volts ran within 3½ feet of the ground (R. 162, 181), were bare, uninsulated (R. 162, 181, 239). The wires carrying 12,500 volts to the transformers are only six feet six inches above the ground and are uninsulated (R. 195, 201).

Expert Rising testified (R. 178):

> "It is my opinion that the 12,500 volt conductors within reach of any person who might be inside the enclosure, whether authorized or otherwise would be hazardous" (R. 178): "would be hazardous to any person who might be working inside of that area, because they might, either through lack of knowledge or misunderstanding or through accident come in contact with them" (R. 179).

Gilbert, foreman for the Idaho Power Company testified (R. 239):

"No man should have been in that yard unless he was qualified. The wires were low and there was a possible chance of tripping or falling or reaching to them, that is a hazard that we watch if there is anything hot and a man is in the yard.

Expert Witness Smith testified (R. 195):

"The first hazard upon entering the gate, that I noticed, was the fact that bare conductors were very much in evidence within six feet and six inches of the ground and long before a man approached the disconnector he is going past those hot conductors. He has to turn to the left and again to the right and travel a distance of approximately 30 feet before there is any possible chance of deenergizing any portion of this sub-station . . .

"Entering that sub-station with that much energy is hazardous to any person, until such time as that pole switch is operating, then it is still hazardous after they get around on the other side where the arresters are." (R. 197)

(b) The manner of wiring to the pole-top switch, in combination with the uninsulated high voltage wires to the lightning arresters at a 3½ foot height, constituted a potential death-trap for electricians and non-electricians alike.

Expert witness Smith testified (R. 205):

"My first assumption when I saw that (pole-top) switch from outside the gate, the first time I ever saw the substation a short time ago—this disconnect switch as it is called on the side, is intended to disconnect all of the equipment in the sub-station. . . . That is to be

expected in cases of this kind—that the disconnector is for that purpose—to disconnect all of the equipment in there. I would expect it unless I was cautioned beforehand and then, of course, I would look further, the first impression is that the disconnector would turn off all of the electricity."

"Q. The ordinary standard is, if a man entered there that day, at the time that the picture shows the conditions, and if he saw the pole switch open, he would have a right to believe that all of the energy was out of the sub-station, the lightning arresters and everything else, wouldn't he?

"A. Yes, I would assume that all of the electricity would be off if the pole-top was open."[1]

(R. 196-197) " . . . this (pole-top) disconnector does not state clearly that it turns off all of the equipment in the substation, it merely leaves the inference that this connector does the work, . . . Now, any person operating that disconnect switch with any knowledge, any experienced person about to enter this inclosure should by all means obtain a hot-stick and disconnect those three connectors ahead and above the lightning arresters. Now, in the event that is not done, the inclosure is not safe for another reason, because arresters of this type should have an inclosure within the inclosure, even experienced persons should not be permitted to come close to these arresters in making repairs or adjustments or even reading meters."

---

[1]Shoup, the Plant Manager for Pacific Fruit, admitted that this was his belief until the day of the accident (R. 299) although he had charge of the keys to the locked enclosure (R. 293). It was certainly permissible for the jury to infer that H. O. Johnson, the assistant superintendent, labored under the same erroneous belief since he assured plaintiff that all power was off on the day of the accident (R. 109).

(c) The evidence showed that it was unsafe for a non-electrician, whether he be instructed or cautioned or not, to operate the lightning arrester cutout switches.

Plaintiff's expert Rising testified (R. 184):

> "It would be safe (for a non-electrician) to operate the pole-top switch but it would not be proper because no one but a qualified person should enter that sub-station except in company with or in the company of and under the supervision of a qualified person. As far as the cutout switches are concerned I would not consider it safe for anyone but a qualified person to operate them."

(d) The evidence further showed, as detailed above, that unless the lightning arrester cutout switches were opened, the bare 12,500 volt leads to the lightning arresters, only 3½ feet high, made work around them unsafe even for experienced persons (R. 197).

Gilbert, foreman for the Idaho Power Company, testified (R. 239):

> "No man should have been in that yard unless he was qualified."
>
> "At no time would I send a man into that place unless there was a qualified man with him" (R. 246).

Expert Smith said (R. 207-8):

> "In the first place, it is not safe for an inexperienced person to go in there alone, if there is energy there at all an inexperienced person should not go alone."

There was thus ample and clear evidence that the substation was hazardous for qualified electricians and non-electricians alike. Certainly, the evidence was more than adequate to support conclusion by the jury that the substation was not capable of safe operation by a non-electrician, whether or not he was properly cautioned. Even if there were conflict on this point, and we know of none, it was not for the court to resolve. This was for the jury alone. *Gunning v. Cooley*, 281 U. S. 90, 94; *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, 68; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35-36.

As shown above, the description of the physical set-up station was sufficient in itself to base a finding of extreme and unnecessary hazard but the uncontradicted evidence went much further. There was testimony that the pole-top switch could have been arranged to cut all power in the station either simply by using five or six more feet of wire and tying in or tapping the lightning arresters on the other side of the pole-top disconnect switch (R. 177, 244-245) or by putting the lightning arresters outside this enclosure (R. 177).

There was evidence of general practice:

> "It is the general practice where this type of arrester is used, or a similar type, to mount them on a high pedestal or to put them beyond reach, and beyond accidental contact." (R. 180)

The safety code also provides that there shall be barriers in addition to the barriers around the substation itself (R. 180).

"As to the condition of safety there were no barriers around the hot conductors and they did come down within approximately three and a half feet of the ground, which would be not according to the custom." (R. 181)

2. The court of appeals disregarded plaintiff's evidence as to standards of reasonable care and made its own finding of fact, i.e. that the evidence showed merely that the customer buying the electricity did not—

"put in the latest safety devices, has not rebuilt to a high safety standard"

or

"modernize his equipment to comply with improved safety developments". (App., pp. 53-54).

As shown above, the mere description of the physical set-up of the substation was sufficient in itself to justify a jury finding of extreme and unnecessary hazard but the uncontradicted evidence went much further. There was testimony that the pole-top switch under the custom and practice of electricians or anyone else would be expected to disconnect all equipment in the substation (R. 206).

It was improper in November, 1950 to furnish electricity of this voltage to the substation with those arresters because the installation, the method of installation, was more hazardous than the arresters themselves (R. 202).

Under the same circumstances, in the Idaho Power Company, if there had been such a substation, the company

would have either barricaded or eliminated the lightning arresters with the wires so low that there was a possible chance of tripping or falling or reaching to them (R. 239).

There are three other identical substations in the Pocatello area. Only one has lightning arresters located in the same way without barriers, without being placed out of reach (R. 240-241). It is at Batiste Spring. The Union Pacific owns it (R. 241).

The old "dry-type" arrester used in this substation (R. 243) is not standard equipment; it was virtually abandoned by power companies in the 20's (R. 201). "Along in the 20's, about '27, the pellet type of arrester came into use and since then I don't know of any company that ever sold this type of arrester." (R. 202).

The general practice in the electrical industry of one who was furnishing electricity through such a substation under such conditions if they observed them makes it incorrect to continue to supply current under known hazardous conditions (R. 194, 200). It is their duty to refuse (R. 200).

The design and construction thus were shown to be hazardous, not merely for lack of new-type lightning arresters which had been evolved in 1927 and not merely by standards of new techniques developed since 1925. The hazards in the substation arose from failure initially simply to use an additional 18 feet of wire to hook in the three lightning arresters on the load side of the pole-top switch; from failure to move or barricade or elevate the old type lightning arresters with uninsulated wires carrying 12,500 volts with-

in reach of anyone who might touch or reach for them through mistake, ignorance, or accident.

Rewiring to the load side of the disconnect switch elevation of the arresters, separate barricades for them or their removal outside the main enclosure to a separate enclosure were not merely "modern techniques" of "today" nor were they merely "new" methods or "latest" safety devices. They were shown to be called for by ordinary prudence and by the standards of operation of other companies and in the industry as well as by the electrical safety code.

This evidence of the failure to have any of these safeguards, coupled with the showing of knowledge by the Union Pacific[1] of the hazards of the design and of the lack of training of those working in the substation were, even if there were conflicts—and we know of none—all required to be assumed by the appellate court to be true in passing on the motion.

Relying as it does on its own independent evaluation of the record as showing merely a failure of the customer to modernize and adopt the latest safety devices, the court below in its decision plainly violates the rules prescribed by this Court and required by the Seventh Amendment.

Because it failed even to take account of much of the

---

[1]In acknowledging foreseeability (App. pp. 52-53) the court of appeals impliedly recognized—and it did not otherwise negative the adequacy of the evidence to show—knowledge by the Union Pacific, through its employees, that non-electricians were working in the substation with the lightning arresters not disconnected. The evidence on this point is sufficiently detailed above. (pp. 14-15).

most vital evidence for plaintiff, much less view it in the light most favorable to plaintiff, the decision of the court below requires review by this Court.

This court has from the beginning recognized its duty most zealously to guard the right of trial by jury as a basic and fundamental feature of Federal jurisprudence and that even a seeming curtailment of the right must be scrutinized with the utmost care. *Baylis v. Travelers Ins. Co.*, 113 U. S. 316, 321; *Jacobs v. New York City*, 315 U. S. 752; *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 354; *Wilkinson v. McCarthy*, 336 U. S. 53, 71 (Concurring opinion). It held in the *Tennant* case *supra*, pp. 35-36, there is no reason why this Court should abdicate its "duty to protect and guard that right."

II.

THE COURT OF APPEALS HAS DECIDED QUESTIONS OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH PERTINENT IDAHO DECISIONS AND WITHOUT REFERENCE TO THEM, AND, IN ASCERTAINING THE LAW GOVERNING THE DUTY OF RESPONDENT HAS SO FAR DEPARTED FROM THE SETTLED COURSE OF JUDICIAL PROCEEDINGS AS TO REQUIRE CORRECTION BY THIS COURT.

Insisting on full observance of the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64, this court in *West v. American T. & T. Co.*, 311 U. S. 223, said (p. 236):

> "State law is to be applied in the Federal as well as the state courts and it is the duty of the former in every case to *ascertain from all the available data what the state law is and apply it* rather than to prescribe a dif-

ferent rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the Federal courts. * * *" (Emphasis supplied).

In *Angel v. Bullington*, 330 U. S. 183, 191, this Court pointed out that enforcement of state policy was the essence of diversity jurisdiction. Applying that rule, the lower courts generally have recognized as available data the considered dicta of state courts (*Mattson v. Central Electric and Gas Co.*, 174 F. 2d 215, 221-222, 8th Cir. 1949); the rationale of the state cases (*Jackman v. Equitable Life Assur. So. of United States*, 145 F. 2d 945, 947 ((3d Cir. 1944); *Spielberger v. Textron Inc.*, 172 F. 2d 85, 87 (2d Cir. 1949). Any persuasive data that is available such as compelling inferences or logical implications from other related adjudications and any convincing manifestation of local law having a clear root in judicial conscience and responsibility should be given heed (*Yoder v. Nu-Enamel Corporation*, 117 F. 2d 488, 489 (8th Cir. 1941); *Cold Metal Process Co. v. McLouth Steel Corp.*, 126 F. 2d 185, 188 (6th Cir. 1942); and state policy whether it arises from statutes, rules or decisions of the state courts must be given effect (*Martineau v. City of St. Paul*, 172 F. 2d 777, 780 (8th Cir. 1949); *Griffin v. McCoach*, 123 F. 2d 550, 551 (5th Cir. 1941).

Assayed by these principles, the absence in the opinion of the court below of citation of Idaho authorities as basis for decision would create the impression that no Idaho decisions have any pertinence. However, the state is not a judicial vacuum on the issues presented. In failing to take into account the Idaho decisions on closely related issues the decision of the

court below ignores the Rules of Decision Act and the principles established by this Court to safeguard its observance.

The court below announced its conception of its duty to be to reason the case along the lines it thought "would appeal to an Idaho court" (App., p. 51). Before it reached that point in its decision, however, it had already decided a matter of property law, namely the place or time at which ownership of the energy passed, without reference to the Idaho statutes or decisions.

> A. The court of appeals failed to consider Idaho law governing time of passage of title to unascertained or future goods or property.

The Court held (App., p. 50):

> "* * * Here there is nothing in the contract clearly delineating at which spot in the wire electricity became the property of Pacific Fruit. Under such circumstances we would think the presumption[1] would be that the title to the electricity passed at the point where control and dominion of the electricity passed * * *. Surely, this would be not later than the point where the incoming wires went into the substation enclosure".

The court was evidently referring to Defendant's Ex. No. 26[2] (R. 314) providing, inter alia:

---

[1]This language emphasizes the court's failure to recognize that its function was only to determine what it was reasonable for the jury to presume in favor of plaintiff.

[2]Defendant contended this contract expired by its terms on April 28, 1929 (R. 321). But defendant's witness testified that Pacific Fruit operated the station (R. 294) under a written agreement with Union Pacific (R. 299). There being no other contract as to operation, in evidence, the appellate court apparently inferred successive implied renewals of the contract by the parties. See Corbin on Contracts, Sec. 18, p. 36.

> "1. The Railroad Company will construct pole and wire lines and a 600 KVA transformer station necessary for the delivery of power at approximately 2300 volts and 60 cycles to the Pacific [Fruit] hereunder. * * *
>
> "2. The Pacific [Fruit] Company agrees to receive power at a point of delivery to be agreed upon between the parties hereto and at its own expense to install and maintain all equipment necessary for the application of said power beyond the point of delivery."

Petitioner does not question the propriety of treating electrical energy as a fluid like water or like gas, or to its treatment as the subject of ownership and sale.[1] But if it is to be treated as property, it should be recognized that an agreement for the sale of electric energy to be delivered at a specified voltage, billed and paid for monthly on the basis of meter readings and in fact taken only at 2,300 volts, is an agreement for property to be manufactured to order.

While the precise point of delivery was not fixed by the contract, it was, of necessity made certain by the contract that the point of delivery could not be before the energy flowed from the transformers since that was the first place that electricity at the specified 2,300 volts came into existence or was manufactured. Petitioner's injury of course was received from the 12,500 volt current at a point prior to entry of the higher voltage into the transformers.

---

[1]Ashwander v. T. V. A., 297 U. S. 288, 330 (1936); Utah Power and Light Co. v. Pfost, 286 U. S. 165, 179-181 (1931) aff'g 54 F. 2d 803. In the latter case this Court and the district court dealt similarly with the generation and transmission of electric energy, this Court analogizing it to "manufacture to order of goods and their immediate shipment."

As a matter of state law, the court could not rightly hold that title changed at any point earlier than where the current cleared the transformer.[1] Idaho adopted the Uniform Sales Act in 1919, at least five years before the contract was entered into. Section 64-201 of the Idaho Code (Uniform Sales Act, Sec. 17) provides:

> *"No Property Passes until Goods are Ascertained.*
> "Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained * * *"

Section 64-203 of the Idaho Code (Uniform Sales Act, Sec. 19)[2] provides:

> *Rules for Ascertaining Intention.*
>
> "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as

---

[1]As the court below impliedly recognized, the point where control of the energy shifted from Union Pacific to Pacific Fruit is highly important. The cases are uniform that if the energy was still owned by Union Pacific at the point of injury, regardless of who owned the wire, Union Pacific was under a duty to maintain the wire so as to protect those who might come in contact with it. Ohio Power Co. v. Beck, (Ohio) 199 N. E. 860, 861; Daltry v. Media Elec. Light Co., 208 Pa. 403.

[2]The agreement in question does not state where it was executed. If respondent protests that it should be construed under the law of Utah the state of incorporation of Pacific Fruit, Oregon Short Line, and respondent, or under the law of California, home office of Pacific Fruit Express, or Nebraska, the home office of Union Pacific, the answer is that the Uniform Sales Act has been adopted in all three States. (California Civil Code secs. 1737-1739; Nebraska Rev. Stats. 1943, secs. 69-417, 69-419; Utah Code, 1943, secs. 81-2-1 and 81-2-3 (Utah Code 1943, secs. 60-2-1, 60-2-3).

to the time at which the property in the goods is to pass to the buyer: * * *

"Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressd or implied, and may be given either before or after the appropriation is made.

* * *

"Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

The decision in *Bowman v. Adams*, 45 Idaho 217, 261 Pac. 679 (1927) makes delivery the *sine qua non* of the passage of title, as does *Brown v. Herrick*, 34 Idaho 171, 175, 200 Pac. 117.[1]

---

[1]Bowman v. Adams, supra, dealing with the sale of sheep, the court stated (p. 225): "* * * Section 19 of the Uniform Sales Act (C. S., Sec. 5691) provides that, unless a different intention appears, if a seller is bound to do something to the goods to put them into a deliverable state, the property does not pass until such things be done, or if the contract requires the seller to deliver the goods to the buyer, it does not pass until the goods have been delivered." In Brown v. Herrick, supra, dealing with logs, the court said (p. 175): "While the question of the passing of title is not always easy of solution, we think this case falls within the general rule that where the contract of sale provides that the seller shall deliver the property sold at some place specified and receive payment on delivery, title does not pass until such delivery. * * *

"Our opinion on this question has been given the approval of the legislature. * * *"

Under Rule 4 (1) goods of the specified description and in a deliverable state did not exist until after the current had passed through the transformer and been reduced to 2,300 volts. If Rule 5 is applied, title did not pass until the electricity had passed through the transformer for that was the first point at which the goods constituting the subject of the contract came into existence in the form specified in the contract.

Thus the court of appeals in holding that the current that injured petitioner was not owned by Union Pacific decided a pivotal point in the case not only in disregard of the evidence but without reference to statutory and decisional Idaho law having an obvious bearing thereon.

B. The court below failed to take into account Idaho decisions as to the effect of evidence of conformity with standard practice and of failure to adopt latest safety devices.

The court below apparently attached much significance to its finding that "the equipment and wiring for the day it was built was modern" (App., p. 48).

In its conclusion that defendant could not be held liable for refusal to supply electricity to a customer who "has not modernized his plant and has not put in the latest safety devices" (App., p. 53), it apparently gives great, if not conclusive weight to testimony that the substation was "standard" when built in 1925 (R. 236, 246). In so doing, the court disregarded the holding of the Idaho courts:

> "Custom or usage does not determine ordinary care, but the standard thereof is what a reasonably prudent man would do under like circumstances." *Splinter v. City of Nampa*, 70 Idaho 287 ; *Albrethson v. Carey Valley Reservoir Co.*, 67 Idaho 529, 538; *Chase v. Washington Water Power Co.*, 62 Idaho 298, 305).

The court's implied finding of fact that the evidence showed merely a failure to install the latest safety devices, of course, is, as we have demonstrated, another instance of its usurpation of the jury's exclusive power. Assuming the correctness of the fact finding, however, the conclusion of law that there was no duty to install latest safety devices is open to question under the Idaho decisions all of which are ignored by the court. Idaho decisions apply the rule that "Electricity is recognized as one of the most destructive agencies we have, and the highest degree of care and diligence is required by those who are operating electrical plants." *Younie v. Blackfoot Light & Water Co.*, 15 Idaho 56. Where high voltage currents are used and the possibility of serious harm or death is great, the duty of care is but little short of that of insurer. In *Chase v. Washington Water Power Co.*, 62 Idaho 298 (1941), the court said:

> "The care to be exercised by an electric company with respect to its wires is such as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise under the circumstances in order to prevent injury. *Scott v. Pac. Power and Lt. Co.*, 35 P. 2d 749. Wash.).

In the *Scott* case, the Washington supreme court ruled:

> "Where death or serious injury may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it".

In *Chase v. Washington Water Power Co.*, 62 Idaho 298 (1941) the Idaho supreme court applied this rule in full vigor. There two fighting chicken-hawks apparently bridged the standard 28 inch gap between a transmission line and a guy wire. From the guy wire the current flowed to a fence, that had been permitted to lean against it, and on to buildings which were burned. Negligence was found in permitting the uninsulated guy wire to remain in contact with the fence. The evidence showed standard construction did not require guy wire insulation and that it would be impracticable on such high voltage lines. The defendant also argued that enforcement of the suggested spacing of guy wires from all fences a distance equal to that which separates them from the transmission lines would entail tremendous expense to the industry. But the court held (R. 307):

> "The fact insulation of its guy wires, or maintaining a sufficient space between such wires and the wire fence might have been expensive would not excuse appellant from using the highest degree of care in protecting the same * * *
>
> "The authorities are numerous that where, conditions or locations considered, it would be dangerous to have electric wires uninsulated, failure to insulate would be negligence".

Thus, even on the court's finding of mere failure to install the

latest safety devices, coupled with its acknowledgment that there was a foreseeable hazard to the uninitiated who might be admitted to the substation (App., p. 52), there was available data as to the state law which, under the rules announced by this Court, were required to be at least considered by the court of appeals.

C. The court of appeals ignored the Idaho rule that the required care varies with the gravity of the risk. The court below suggested that to here hold respondent for failure to cut off its high voltage current would be to make a jury question of any instance of a supplier selling electricity to a consumer who had an old-fashioned electric heater in which a child might easily get his fingers.

Aside from the distinguishing factor of notice, it would seem to have been pertinent on this point for the court at least to consider the Idaho cases expounding the general rule to the effect that the amount of care to be exercised must be commensurate with the gravity of the risk connected with the activity. *Eaton v. City of Weiser*, 12 Idaho 544, 554, 86 Pac. 41; *Splinter v. City of Nampa* (1950) 70 Idaho 287; *Chase v. Washington Water Power Co.*, 62 Idaho 298. Failure to consider this rule of the Idaho cases was obviously a factor in the reasoning by which the court reached its decision.

D. Idaho decision on duty and liability of one employing an independent contractor was ignored. The destructive character of electric energy and the corresponding, commensurate responsibility placed on those dealing with it, was also

highly pertinent to the consideration of control. Whether or not respondent had active control, did it have the duty to control? The arrangement between respondent and Pacific Fruit Express is highly suggestive of the relation of principal and independent contractor. As the opinion suggests, and the prime agreement states (R. 314) Pacific Fruit was handling the refrigeration work "of and for the Railroad Company * * * and in connection with the handling of said refrigeration" desired to secure electric power from respondent's predecessor in connection with said refrigeration. The highest court of Idaho holds that where one engages a contractor to carry out an undertaking involving hazard he must exercise some care in the selection as to fitness and ability to operate safely.[1] In view of the ignorance of Pacific Fruit's plant manager as to the functions of the respective switches (R. 299) as well as of the hazardous layout of the substation itself the circuit court might well have arrived at a *different conclusion* had it given weight to this Idaho decision.

---

[1]Joslin v. Idaho Times (1939) 60 Idaho 235, 91 P. 2d 386 The cited case involved traffic injuries inflicted by a distributor of news papers. After determining that motoring involved danger, said:

> "* * * It appears to be generally accepted that one employing a contractor to engage in a hazardous employment at least must exercise some care in the selection as to fitness and ability to operate safely, and failure to do so will impose liability for the contractor's negligence."

While the decision does not expressly so state, it seemingly holds that once the hazardous nature of the undertaking is established the principal has the burden of coming forward with the evidence that care in employing was exercised.

Cf. similar Tennessee rule applied to transmission of electricity in Pierce v. United States, 142 F. Supp. 721, 728.

III.

THE JUDGMENT OF THE COURT OF APPEALS DEVIATES FROM THE SETLED PRINCIPLES APPLICABLE TO REVIEW OF DETERMINATIONS OF LOCAL LAW

On questions of local law this Court pays "great deference" to the views of the judges of the district courts who are familiar with the intricacies and trends of local law and practice. *Reitz v. Mealey*, 314 U. S. 33, 39; *Hillsborough v. Cromwell*, 326 U. S. 620, 630. Particularly is this true where, as here, the judge is a member of the bar of the State the law of which is in question. *Bernhardt v. Polygraphic Co.*, 350 U. S. 198, 204. In the Eighth and Tenth Circuits, these principles have been formulated in the rule that in determining prevailing state law, where no state court has definitely settled the question, the decision of the federal district court of the particular state within which it is located should not be overruled unless the appellate court is convinced that the determination is clearly erroneous *Abbott v. Arkansas Utilities Co.*, 165 F. 2d 339, 340 (8th Cir. 1948); *Milton v. Granite State Fire Ins. Co.*, 196 F. 2d 988, 992 (10th Cir. 1952).

The considerations underlying these rules have full impact here. The district judge has been a member of the Idaho bar since 1904 and served as Governor before appointment to the District Court for Idaho in 1943. None of the members of the court of appeals who participated in this case was a member of the Idaho bar.

The trial court instructed the jury on the duties of a seller of electric energy to those coming into proximity with the customer's equipment (R. 374-376), the precise, ultimate question determined by the circuit court of appeals. He filed a written opinion when he overruled the motions for new trial and for judgment notwithstanding the verdict. (R. 31-35). Hence, it is evident that the instructions as given were not only the result of his long experience in the jurisprudence of Idaho but reflected his considered judgment, free from the stress of trial. It might also be noted that respondent's attorneys neither moved for a new trial nor urged as error on appeal any instruction remotely resembling the delineation of a seller's duty enunciated by the circuit court.

The opinion of the court of appeals displays no slightest basis for deeming the trial court to have erred in deciding any question of law. It fails to consider relevant Idaho law and invokes no general common law not consonant with the trial court's determinations of Idaho law.

IV.

THE GENERAL IMPORTANCE OF THE QUESTIONS HERE INVOLVED MAKES IMPERATIVE THE EXERCISE OF THE CERTIORARI JURISDICTION

In the exercise of its discretionary jurisdiction, this Court has long emphasized the continuing importance of its vigilance to preserve in the jury the exclusive power to weigh the evidence and determine contested issues of fact. The in-

ability of the court to distinguish between the degree of care reasonable for protection against serious injury or instantaneous death from a 12,500 volt current and that reasonable as safeguard against the hazards of a 110 volt electric heater betokens the wisdom of this court's solicitude.

In the administration of justice, the benefits of the jury's composite knowledge of every-day affairs are indispensable. Here, however, it is submitted that the lower court's failure even to note, much less observe, the constitutional limitation on its review function requires the exercise of this Court's supervisory power.

Additional reason for certiorari here is presented by basic principles of orderly judicial procedure. If the Rules of Decision Act is to attain the goal envisioned in this Court's decisions, it is submitted that the considered judgment of the federal district court, which also sat as another state court, may not be allowed to be overturned until there is produced some ground for questioning its correctness.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE R. PHILLIPS
LOUIS F. RACINE, JR.
B. W. DAVIS,
Pocatello, Idaho
WILLIAM D. DONNELLY,
Washington, D. C.

November, 1956

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a Corporation,
Appellant,
vs.
LAVERL JOHNSON AND JOLEEN JOHNSON, Husband and Wife, and PACIFIC FRUIT EXPRESS COMPANY, a Corporation,
Appellees.

No. 14,498
May 11, 1956

On Appeal from the United States District Court for the District of Idaho

---

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges.

CHAMBERS, Circuit Judge:

Plaintiff LaVerl Johnson on November 4, 1950, received a terrific shock from electricity while working in a transformer substation of the Pacific Fruit Express Company at Pocatello, Idaho. He, as a laborer of Pacific Fruit, had been sent by his supervisor into the enclosure surrounding the substation to do some painting. Not knowing that wires which were part of the lightning arrester mechanism carried a powerful load of high voltage electricity, he came in contact with one of the wires. As a consequence of this, he had to suffer the amputation of both legs below the knees and of his

right arm close to his shoulder. It is hard to imagine a more serious injury.

Plaintiff receives a certain modicum of compensation under the Idaho industrial compensation statutes which is charged against his employer, Pacific Fruit Express. Moreover, in the U. S. District Court in Idaho he sought and recovered judgment against the Union Pacific Railroad Company, a corporation and citizen of Utah, in this diversity case. His jury award was the sum of $225,000. Naturally Union Pacific has appealed.

Pocatello seems to be a junction or division point on the railroad. At least, we glean from the record that the servicing operations of both the railroad and Pacific Fruit are rather extensive at Pocatello. There Pacific Fruit re-ices refrigerator cars in transit. Johnson did many jobs about the place, but he was not an electrician and seems to have known little about the dangers in an old fashioned sub-station, which this was.

First, we should relate the history of the transformer station. For reasons of economy, an arrangement was made in 1925 between the Oregon Short Line Railroad, (the predecessor company of Union Pacific) and the Pacific Fruit Express that the railroad would buy all of the electricity at Pocatello needed for the two. The wiring would be rearranged and Pacific Fruit would take electricity off of the Union Pacific line, thence through a transformer located within an enclosure, then to a meter, and then over a line running to places of consumption by Pacific Fruit. This arrangement

had the approval of Idaho Power Company, the utility supplying the electricity.

Oregon Short Line built the sub-station containing the transformer within a high enclosure. The equipment and wiring for the day it was built was modern. It was a "package" unit supplied by one of the large electrical equipment manufacturing compaines. By contract, Oregon Short Line was riembursed by Pacific Fruit for the cost of the new station and necessary wiring. The sub-station became the property of Pacific Fruit. It is clear that the ground on which the station stood was the subject of a leasehold to Pacific Fruit. Through the years, a majority of the electrical work done at Pocatello for Pacific Fruit was done by Union Pacific electricians. For this work, Pacific Fruit was bound to compensate and did compensate Union Pacific after it took over the railroad line from the Oregon Short Line.

The economic advantage of the whole arrangement to the companies was this: Either Union Pacific could get a cheaper rate than Pacific Fruit or there was a rate stucture which grew progressively lower with greater consumption which was achieved by combining the intake of the two over one line from the local utility, the Idaho Power Company. The arrangement was that the metered consumption of power by Pacific Fruit, plus a ten percent addition charged to loss on transmission and to overhead, would be deducted from Union Pacific's total reading for the electricity, thus getting Union Pacific's net consumption. Then the total bill would be pro-rated, Pacific Fruit each month reimbursing Union Pacific for the former's aliquot portion.

At the time of Johnson's injury, there seems to have been little change in the station from the time it was built. When he entered the enclosure to do his assigned painting, using one of the keys to the enclosure in the possession of Pacific Fruit supervisors, he had been informed by someone in authority in Pacific Fruit that the electricity had been cut off. To completely deaden the sub-station, four switches should have been pulled. Only one switch was disconnected. This was the switch carrying the current to the meter and thence out of the sub-station to the Pacific Fruit places of consumption. Three switches that left the wires which were a part of the lightning arrester mechanism still energized with electricity had not been pulled. With one of these wires, Johnson came in contact. For one trained in electrical apparatus, to take hold of the wire as Johnson did, would have been obvious negligence. Here the conditions under which the Pacific Fruit sent Johnson in to the place seems to have been dangerous. At least as to Pacific Fruit it could not be less than a question of fact on negligence, if theirs had been a common law liability.

Two contentions, we lay to one side immediately. Union Pacific claims it was not an electricity utility. And it says it never sold any electricity to Pacific Fruit: Pacific Fruit was just paying the Idaho Power Company for its own electricity. In the face of the billing to Union Pacific for the whole and the rebilling to Pacific Fruit by Union Pacific, we cannot see that there was anything but a sale of electricity from Union Pacific to Pacific Fruit Express.

On the other hand, Johnson argues that the electricity

which injured him in the sub-station had not yet passed through the meter of Pacific Fruit, thus it still belonged to Union Pacific and Union Pacific had a duty to take care of the electricity until it reached the meter. Of course, many cases turn on nice distinctions, which are unfortunately unavoidable. Here there is nothing in the contract clearly delineating at which spot in the wire electricity became the property of Pacific Fruit. Under such circumstances, we would think the presumption would be that the title to the electricity passed at the point where control and dominion of the electricity passed from one company to the other. Surely, this would be not later than the point where the incoming wires went into the sub-station enclosure.

One of Johnson's claims here is undoubtedly grounded on the proposition that Union Pacific maintained joint control of the sub-station. If so, Union Pacific is certainly in a dangerous position in the case. Johnson produced some testimony that certain Union Pacific men had been in and around the sub-station on the day in question doing certain work and also at some other times. Even though this was not work charged for by Union Pacific, as was usually done, at worst from Union Pacific's standpoint, the activity was subject to the inference that it was repair or maintenance work which should have been charged for as it is to the inference that it was work done intentionally for Union Pacific as a part of joint control. The fact that Pacific Fruit (not disputed) always kept the only keys to the enclosure is almost conclusive on the matter of control. While railroad employees discharging the ordinary duties of persons in their capacities

working for railroads may be presumed to be acting in the scope of their authority, we think no presumption can be drawn of joint control when they are casually found in a place where there is no showing they have a right or duty to be or if there within the scope of their authority, their presence is consistent with engaging in their employer's work as an independent repair contractor. When under the contract, Pacific Fruit was obligated to maintain the station, although it from time to time hired Union Pacific to do so, and occasionally someone else, we think to overcome the contract arrangement and establish joint control of the station someone of substantial authority with Union Pacific would have to be connected up with some joint control activity. Otherwise, the contract arrangement should govern.

No Idaho case is cited by either party which seems to us to conclusively answer the problems presented here. Of course, if there were such a case, this case wouldn't be here. Therefore, this court must proceed to reason the case along lines that it thinks would appeal to an Idaho court.

It is not to be gainsaid that the sub-station here is outmoded. It perhaps could not have been built under regulations in force at the time of Johnson's injury. Today modern techniques in building such stations would not leave any wires such as Johnson came in contact exposed where he could easily touch them. There are new methods for taking such wires away from the transformer. There are improved types of arresters which make such enclosures much less dangerous.

Union Pacific cannot be charged for defective original

construction, if it had been originally defective, because it did not build the station. The question is: Did it have a duty to stop sending its electricity into the sub-station, which had become outmoded and a hazard to the uninitiated who might be admitted without proper precautionary instructions.

Much is said here of negligence, proximate cause, intervening and superseding causes. We think it possible that there was at least a question of fact whether it was to be anticipated that Pacific Fruit would sooner or later let a man unfamiliar with electricity and safety measures into the enclosure without the switches all turned off.[1] Perhaps, it was foreseeable that sooner or later someone would get "mixed-up" with exposed and energized wires running around at points less than full body height.[2]

Plaintiff relies heavily on the appliance cases. Perhaps generally they may be summarized as holding that a supplier of gas or electricity has no duty to go on to the premises of his customer and look for defective appliances.[3] But if he knows of defective appliances, he has a duty to stop supplying his product or suffer with the owners of the appliances the

---

[1]A serious question is posed as to whether plaintiff Johnson is not precluded here on causation under the decision of Chatterton, et al. v. Pocatello Post, 70 Ida. 480, 223 P 2d 389.

[2]In this connection, the cases of keys left by owners in automobiles with a resulting theft of the automobile and a negligent injury to an innocent bystander (while the car was driven by the thief) may not be inapposite. See Gower v. Lamb, ___ Mo. App. ___, 282 SW2d 867; Richards v. Spence, ___ Cal. 2d ___, 271 P. 2d 23.

[3]Minnesota Electric Light & Power Co. v. Hoover, 102 Okla. 270, 229 P. 285.

consequences for injuries to third parties.[1] And we assume that the rule is the same for equipment as for appliances. As we understand the appliance rule, the supplier with knowledge of the customer's appliances is held to be obliged to not furnish his product to appliances which *cannot* receive the product safely.

We think it one thing when a company turns its gas into lines which carry into a leaking stove known to it to be leaky or turns its electricity into new electric wires improperly installed and known to contain the possibility of fire at an early moment if the wires are energized. Usually the supplier has a duty there. Perhaps the duty also exists when a known hazard arises from the owner's failure to maintain or repair or restore equipment to its original condition.[2] Perhaps there the supplier has a duty to shut off his product. Beyond that, we do not think the cases go.[3]

But we are not convinced that when a customer has an appliance maintained in its original condition of repair and function, capable of use by the trained, capable of use with safety by the untrained if properly cautioned, that the supplier has any duty or right to cut off the supply of his product (which he is obligated by contract to supply) because the customer has not modernized his plant and has not put in the latest safety devices, has not rebuilt to a high safety standard.

---

[1]Hoffman v. Leavenworth Light, Heat & Power Co., 91 Kan. 456 138 P. 632.

[2]Bristol Gas & Electric Co. v. Deckard, 6 Cir., 10 F. 2d 66. (There may be some question whether the Bristol case on its facts represents the weight of authority.)

[3]See Kelly v. Duke Power Co., (4 Cir.) 97 F. 2d 529.

We analogize to the case of a band saw. For some woodworking operation it is possible to install safety devices that make it very difficult to get one's fingers into the saw. But it was not always thus. Earlier band saws had little protection and it was quite foreseeable that a person around one of the earlier types was apt to get his fingers in it. We think there is no case that requires the vendor of electricity to require that his customer modernize his equipment to comply with improved safety developments when the equipment can be operated safely by the trained and safely by the untrained if properly cautioned.

If we make an exception for the tragic LaVerl Johnson, which we do not see how we can, we do not know where we could stop. Wouldn't it mean that every supplier of gas would have to be sure that every stove had the most modern safety devices? Wouldn't it mean that it would be a jury question against the supplier of electricity who sold it to one having an old fashioned electric heater into which a child easily gets his fingers—if it could be shown that modern heaters have better protection which keeps fingers out?

Union Pacific raised other points not necessary to consider in view of our conclusions here.

Upon the basis of our belief that there was not duty of Union Pacific to withhold electric current here, we hold the trial court should have granted plaintiff's motion for a directed verdict at the close of all the evidence. The case will therefore go back under a mandate to enter judgment for the defendant.

Probably the better school of "judging" holds to the view that one should forthrightly pronounce one's decision and say no more. However, this is a hard case. The result we reach brings us no pleasure or happiness. We wish we could see it otherwise.

But, as we look at it, Johnson is entitled to no more than his established claim on his Idaho workmen's compensation as against Pacific Fruit Express. We leave him where so many others in Idaho must be left—with only the claim arising out of his employment.

Judgment reversed.

(Endorsed:) Opinion. Filed May 11, 1956. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a Corporation, *Appellant,* vs. LAVERL JOHNSON AND JOLEEN JOHNSON, Husband and Wife, and PACIFIC FRUIT EXPRESS COMPANY, a Corporation, *Appellees.*	No. 14,498 May 11, 1956

JUDGMENT

Appeal from the United States District Court for the District of Idaho.

This cause came on to be heard from the United States District Court for the District of Idaho, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant and against Appellees Johnson.

IT IS FURTHER ORDERED and adjudged by this Court that the Appellant recover against the Appellees Johnson for its costs herein expended and have execution therefor.

(Endorsed) Judgment

Filed and entered: May 11, 1956
PAUL P. O'BRIEN, Clerk

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT EXCERPT FROM

Proceedings of Friday, August 3, 1956

Before: Stephens, Fee and Chambers, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the court, IT IS ORDERED that the petition of Appellees, filed July 9, 1956, and within time allowed therefor by rule of Court and valid extension thereof, for a rehearing of the above cause be and hereby is denied.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. ..... October Term, 1956

LAVERL JOHNSON AND JOLEEN JOHNSON, husband and wife, AND PACIFIC FRUIT EXPRESS COMPANY, *Petitioners,*

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation

UPON CONSIDERATION of the application of counsel for petitioner (s),

IT IS ORDERED that the time for filing petition for

writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November, 15, 1956.

/S/ WM. O. DOUGLAS
Associate Justice of the Supreme
Court of the United States

Dated this 5th
day of October, 1956

APPENDIX C

A Copy of Exhibit 16 of which Exhibit 20 is an enlargement.